

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO. P79/98

In the matter between :

G. MABOMBO

Applicant

and

SHOPRITE CHECKERS HOLDINGS  
(PTY) LTD  
COMMISSIONER VAN DER WALT  
COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION  
PORT ELIZABETH

First Respondent

Second Respondent

Third Respondent

## JUDGEMENT

MLAMBO J :

1. This is an application in terms of section 145 of the Labour Relations Act No. 66 of 1995 to review and set aside an award of Prof. Van der Walt, a commissioner of the Commission for Conciliation, Mediation and Arbitration. He was appointed to arbitrate a dispute by the Commission in Port Elizabeth. For convenience's sake I shall refer to Prof. Van der Walt as "van der Walt" and to the Commission for Conciliation, Mediation and Arbitration as "the Commission."
2. I propose to consider two preliminary matters before the main application. These matters relate to a joinder and a condonation application.
3. The application for review initially cited the first Respondent as the sole

Respondent. Though the application seems to have been served on the

Commission the application was defective as the Commission and van der Walt would not be able to oppose same if they so wished as they were not cited as Respondents. In the normal course they should have been cited as Respondents as it is van der Walt's award which is sought to be reviewed, therefore he and the Commission had a direct interest in the matter. The Commission and van der Walt were joined by application filed on 11 May 1998 as the third and second Respondents respectively. Service of the joinder application, as well as the initial notice of motion, founding affidavit and all supporting documents was also effected on them. I am satisfied that the application is now properly before me as all parties who have a direct interest in the matter have been cited and have knowledge of the application. The application for joinder is therefore allowed.

4. I now proceed to deal with the condonation application. The award sought to be reviewed and set aside is dated 30 October 1997. It is not clear whether Applicant became aware of the award on the said date or on a later date. However, the Applicant filed her review application on 24 March 1998. As Applicant correctly concedes the application is some 156 days out of time, hence the condonation application.

5. Section 145(1)(a) provides that any party alleging a defect in arbitration proceedings conducted under the auspices of the Commission may apply to this Court within six weeks for the resultant arbitration award to be set aside. In terms of section 158(1)(f) this Court has the power to condone the late filing of any document in this Court. Good cause must, however, be shown for condonation to be granted. To show good cause the Applicant must provide an explanation for the delay, and the prospects of success in the main matter. The Court has a discretion in deciding whether good cause has been shown. See *MELANIE v SANTAM LTD* 1962 (4) SA 531 (A). The Labour Appeal Court has affirmed this principle in *MM STEEL CONSTRUCTION v STEEL ENGINEERING AND ALLIED WORKERS' UNION* 1994 (15) ILJ 131 (LAC). The Court, in

addition to the explanation tendered and prospects of success, will also have regard to the extent of the delay and the importance of the matter. In considering these factors no single factor is more important than the others.

6. I first consider the explanation tendered for the delay. The Applicant puts the entire blame for the delay on her trade union, the South African Commercial and Catering Allied Workers' Union (SACCAWU) which represented her during the arbitration proceedings. She states that since the award was made on 30 October 1997 she tried unsuccessfully to get hold of Lutywantsi, her union official. She managed to contact him around 28 January 1998 and that's when she received the award.

7. She says she was already depressed and her health had degenerated and, as a result, she could do nothing about the award until February 1998 when she requested SACCAWU to review the award. SACCAWU apparently declined to do this but did not give her her file despite her requesting it. It is debatable whether SACCAWU would have kept the award out of her reach from October 1997 to January 1998. However, when she saw the award and saw the alleged defects therein she did not then request SACCAWU to review the award. She concentrated her energies at resolving her health problems and only in February 1998 did she request SACCAWU to institute review proceedings.

8. In January 1998 when she saw the award any review application in terms of section 145 was already late. She must have realised this but she took no steps to set in motion the review proceedings. Furthermore, if one believes her that she only became aware of the award on 28 January 1998 it appears anomalous that she would have battled for approximately three months from October 1997 to speak to her union representative to contact her union representative. If one assumes in her favour that she was an organiser one would have expected her to explain whether she asked anyone at the trade union offices for a copy of the award.

9. If one further assumes in her favour that she was unable to get hold of the award from SACCAWU there is no explanation whether she approached the Commission for a copy. Whilst it might be correct that some blame might be attributable to SACCAWU the Applicant has provided a very unsatisfactory explanation of what she has personally done to try and mitigate the delay.

Considering all of the above, I am not satisfied that the Applicant has provided me with an acceptable and reasonable explanation for the delay.

10. I now consider her prospects of success in the review application. The grounds upon which the Applicant relies for review are that :

10.1. The till slip which allegedly depicts the goods that she is supposed to have underrung is dated 12 January 1997, whereas the incident regarding the under ringing is alleged to have taken place on 16 January 1997.

10.2. The security guard, Mr Landman, who allegedly saw her under ringing the goods never came to her immediately after the incident to confront her about it. He only came hours after.

10.3. The items which she is alleged to have underrung were never shown to her. Other than these grounds no other grounds are cited why the award should be reviewed and set aside.

11. Section 145(2) provides that a defect means :

**“(a) that the Commissioner -**

**(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;**

**(ii) committed a gross irregularity in the conduct of the arbitration proceedings;**

**(iii) exceeded the commissioners powers; or**

**(b) that the award has been improperly obtained.”**

An award is not reviewable simply because someone else would have come to a different conclusion on the same facts. Furthermore an award is not reviewable when the arbitrator applied his mind to the matter before him. Where, however, it is shown that an arbitrator ignored direct evidence which would have influenced his decision in another direction, then this award is reviewable.

12. In casu the impression created is that the arbitrator ignored the date on the till slip. During the argument I requested Miss Mabombo to explain whether the till slip concerned was shown to the arbitrator as his award is silent in that regard. She submitted from the Bar that this till slip was given to the arbitrator by the first Respondent's representative. However, she did not deal with this aspect at all in her affidavit before me. If indeed the till slip was handed to van der Walt it is clear that he would have dealt with the discrepancy in dates. However this is not crucial in determining whether his

award is reviewable, assuming that it was shown to him.

13. It is clear from van der Walt's award that he applied his mind to the evidence of Landman, Barnard, and the Applicant about the incident itself. His analysis of the evidence is not attacked as being inaccurate or erroneous. Applicant does not deny that the incident in question took place. She confirmed in the arbitration proceedings that she saw Landman confront the customer and take her to Barnard's office, the manager. The Applicant did not deny that the customer was arrested and that she followed the police van to the police station. She tried to deny this during argument, stating that she never followed the car but the facts as she stated in the papers are very clear that, despite the fact that she was suspended earlier, she sat in a green car until the police van left for the police station, whereafter the green car also left, following the police van. She further confirmed that she asked for the customer's telephone number.

14. Applicant's defence during the internal disciplinary enquiry was that packets were left next to her till. However, this aspect was adequately dealt with by van der Walt. I further agree with him that that aspect on its own is not determinative of whether she underrung the goods or not. I therefore do not see how the arbitrator could have been influenced in another direction by the fact that the Applicant was not confronted immediately after the incident and that she was not shown the underrung goods. I am of the view that van der Walt correctly found that the Applicant conducted herself in a dishonest manner, thereby breaking the trust her employer placed in her. I am further of the view that van der Walt correctly found that her behaviour had destroyed her employment relationship with her employer. See in this regard the matter of STANDARD BANK LTD v CCMA AND OTHERS [1997] 6 BLLR 622 (LC).

15. In the light of the foregoing I am of the view that the Applicant has no prospects of success whatsoever in a review of the matter. Even if one were to consider a review in terms of section 158(1)(g) there are no prospects whatsoever as it is clear that van der Walt applied his mind properly to all the facts at hand. Despite the fact that it is academic I proceed to deal with the extent of the delay. The delay is some 156 days. As already stated the Applicant could have taken steps to obtain the award much earlier which she failed to do. She also failed to institute her proceedings immediately she became aware of the award. The delay in itself is too long to the extent that it cannot be said to be reasonable. It follows therefore that the application for condonation must fail as no good cause has been shown.

16. The application is therefore DISMISSED. There is no order as to costs.

D. MLAMBO

JUDGE OF THE LABOUR COURT

DATE OF HEARING : 6 August 1998

DATE OF JUDGEMENT : 13 August 1998

FOR THE APPLICANT : In person

FOR THE RESPONDENT : No appearance

This judgement is available on the internet at [www.law.wits.ac.za/labourcrt](http://www.law.wits.ac.za/labourcrt)